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JAN 10 1957
JOHN T. FEY, Clerk

No. 687

In The

Supreme Court of The United States

October Term, 1956

JOHN FEDERIKA and CATHERINE FEDERIKA, his wife, MAX FOGEL and HELEN FOGEL, his wife, ROBERT FOGEL and SYLVIA FOGEL, his wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ————

JOHN FEDERIKA and CATHERINE FEDERIKA, his wife, MAX FOGEL and HELEN FOGEL, his wife, ROBERT FOGEL and SYLVIA FOGEL, his wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Federika and wife, Max Fogel and wife, and Robert Fogel and wife, your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cases on October 17th, 1956.

OPINIONS BELOW

The opinions of the Tax Court are reported as T. C. Memo 1955-172, T. C. Memo 1955-186 and T. C. Memo 1955-185, nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4). A petition for rehearing was denied

on November 13, 1956. The opinion of the Court of Appeals is reported at —— F 2d ——.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1956. A petition for rehearing was denied on November 13, 1956. The jursdiction of this Court is invoked under the provisions of 28 U.S.C.A., sec. 1254 (1) and section 7482 (a) of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether an unparticularized and unexplained approximation of wagering losses was lawfully made under the Code, Regulations and judicial decisions applicable to these cases?

STATUTES AND REGULATIONS

The statutes and regulations involved are set out in Appendix A, infra, pp 10 and 11.

STATEMENT

A. The Basic Facts

The basic facts are the same in the appeals of all petitioners. The husbands in each case were involved in several business enterprises which consisted of either bookmaking, that is accepting bets on horse races or betting, that is placing bets for their own accounts with other bookmakers on horse races. The Fogel cases were tried on the same record and the Federika case was tried sep-

arately. The opinion and findings of the Tax Court in all three cases were uniform in that the Court accepted the books and records of the petitioners for most of the years, but refused to accept them for one or more years and for those years accepted the determination of the respondent in which he applied a formula (not founded on any reason, sense or logic) where he arbitrarily disallowed losses occurring on days which resulted in a net loss but accepted the same records where on any day a net win was reported. In one instance, without reason, logic or sense, the Court in its findings disallowed losses on a particular day of the week. No claim was made by the respondent that his disallowances were based either on his experience, peculiar knowledge or facts, but was merely a formula adopted arbitrarily. In some instances the Tax Court disapproved and in other years approved the respondent's disallowance of all losses in the bookmaking business which exceeded 86% of the total amount of bets taken. The only reason mentioned in one or more of the cases for this formula was the fact that in the operation of race tracks the race track withholds 14% and distributes the remaining 86% among the winning bettors. The evidence clearly showed that the petitioners herein were not operating race tracks but were bookmakers having no such rule where they took out 14%. The Court of Appeals affirmed on the opinion of the Tax Court and adopted it as its opinion.

B. The Decision of the Court of Appeals

B. The decision of the Court of Appeals has nothing to sustain it. Everything that can be said about the opinion of the Tax Court naturally applies with equal force to the adoption of said opinion by the Court of Appeals.

Its deficiencies are better pointed out in the decision in *Showell* v. *Commissioner of Internal Revenue* which was followed by the Tax Court as authority for its decisions herein but on review was reversed by the Court of Appeals Ninth Circuit, — F. 2d —.

REASONS FOR GRANTING THE WRIT

1. The decision below is in real, direct and embarrassing conflict with a decision of the Ninth Circuit Court of Appeals and also is in conflict with decisions of the First and Fifth Circuit Courts of Appeal and of the Tax Court of the United States.

a. The cause, in these cases, was argued to the Sixth Circuit Court of Appeals on October 10th, 1956 and, on October 17th, 1956, orders were entered in each case,

> "that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court".

Therefore, in each case, the opinion of the Tax Court specifically was adopted as the opinion of the Sixth Circuit Court of Appeals. Each case had been tried in the Tax Court before the same Division of the Tax Court and in each case the opinion of the trial judge had specifically followed a decision of the full Tax Court in the case of *Jack Showell*, 23 TC 495 (on appeal to U.S.C.C.A. 9) and had applied the same findings of fact and conclusions of law as therein.

On the day that these cases were argued to the Sixth Circuit Court of Appeals (October 10th, 1956) the decision of the Ninth Circuit United States Court of Appeals reversing the decision of the Tax Court in the *Jack Showell* case was announced and is now reported in — F (2d) —.

On November 13th, 1956 the Sixth Circuit denied petitions for rehearing herein.

All of the contentions of the petitioners herein were involved in the *Showell* case and have been ruled in favor of the petitioner by the Ninth Circuit Court of Appeals.

In the opinion of Judge Pope in the *Showell* case, which concurred with the majority opinion, the rendition of a final judgment was urged on the cited basis of a Sixth Circuit opinion in *Gasper* v. *Commissioner,* 6 Cir. 225 F. 2d 284, 287.

b. The meaning of "gross income" is vital in these cases. The Commissioner of Internal Revenue had refused to allow any net daily losses recorded in the permanent personal and partnership ledgers maintained for the alleged reason that such entries were not sufficient to establish gross income and to reflect the taxable income clearly but had accepted the figures of net daily gains reflected in the same records.

The Tax Court "bore heavily" against the petitioners for their failure to maintain adequate records, contending that the reference of Section 54 of the 1939 Internal Revenue Code to gross income meant that petitioners were required to establish the respective amounts of gross receipts, gross winnings and gross losses.

The Tax Court commented, "The petitioner has the burden of proving that the losses claimed were in fact sustained" and, "bearing heavily" against petitioners, proceeded to determine the amount of allowable losses by conjectural approximation.

In *Winkler* v. *U. S.*, 230 F 2d 766 (CA 1st, March 8, 1956) the First Circuit held that the effect of Section 23 (h) of the 1939 Code upon Section 23 (e) thereof was determined in *Humphrey* v. *Comm.*, 5 Cir. 1947, 162 F 2d 853, cert. den. 1947, 332 U.S. 817. In other words

23 (h) was not just an additional restriction upon 23 (e) but was in substitution therefore so far as wagering transactions are concerned.

The First Circuit therefore decided in the *Winkler* case that there was no gain at all within the meaning of Section 22 of the 1939 Code unless winnings in a particular race exceed losses in that same race.

> *The disallowance of any amount of losses on losing days deprives a taxpayer of the benefit of Section 23 (h) of the 1939 Code and includes in "gross income" loss deductions specifically permitted by the Code.* (emphasis by petitioners)

No Statute, regulation or judicial decision required the keeping of records separating gains from losses in wagering transactions prior to 1951 and the separate reporting of total gains, from which total or partial losses might be deducted only if substantiated in an unspecified manner, out of harmony with the specific statutory provision permitting the deduction of losses from gains to the full extent of gains.

Both the Tax Court in *G. A. Comeaux,* 10 TC 201, aff. 176 F 2d 586 (CA 10, 1949) and the Supreme Court of the United States in *Comm.* v. *Heininger,* 320 U.S. 467, have held that the income tax is not a tax on gross income even if the income be earned in an illegal business.

c. In the *James P. McKenna* case, 1 BTA 326, it was firmly established that the wagering business, upon horses, has no gains until the losses are deducted therefrom and that it is only the net gain that is taxable; that net income is gross income only in the event that there are no statutory deductions to be considered; and, that

> *the actual gains to taxpayers constitute "gross income" within the meaning of the Code.* (emphasis by petitioners)

In the opinion of the Tax Court, which was adopted as the opinion of the Sixth Circuit herein, the rule of the *McKenna* case was abandoned but, on March 8, 1956, in the *Winkler* case, the First Circuit United States Court of Appeals affirmed the "*McKenna Rule*" to be the properly applicable rule of law and that all other payments than net loss over a yearly operation are treated as offsetting gains prior to the determination of gross income.

Even in the now reversed *Jack Showell* case a dissenting opinion was written by Judge Withey of the Tax Court, in which Judge Bruce concurred, to the effect:

> "I am of the opinion that if the record justifies the allowance of any losses in excess of those allowed by the respondent, it justifies the allowance of the full amount of losses contended by the petitioners."

2. The decision of the Court below is in conflict with applicable decisions of this Court.

In *Helvering* v. *Taylor*, 293 U.S. 507, the fact that the Commissioner of Internal Revenue's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require that it be set aside was affirmed by this Court. The Sixth Circuit followed this Court in *Gasper* v. *Commissioner*, 225 F 2d 284 (CA 6) but has now adopted the Tax Court's departure from the principle herein.

The Tax Court, however, did determine here that the action of the Commissioner was wrong and, therefore, no part of the arbitrary determination of the Commissioner should have given rise to any presumption of correctness.

> *It was the duty of the Tax Court to find the facts for itself but its approximation of allowable losses not only is inconsistent with the other findings of fact but also is clearly erroneous because it is based upon*

> *no showing whatever which would warrant a rejection of the proof of the losses disclosed by permanent records.* (emphasis by petitioners)

Under the circumstances disclosed by the Tax Court's findings of fact and opinion there was not even a burden upon the taxpayers to show what the correct amount of a possible deficiency should have been.

The Tax Court found that records kept for previous years were similar to the records kept for the taxable years involved; that the returns and records kept for earlier years had been examined by the Commissioner's agents in the regular scope of their employment and that they did not advise the petitioners wins and losses should be separated or that records kept were otherwise inadequate.

Judge Korner, in *James P. McKenna,* 1 BTA 326, had cited the decisions of this Court in *Eisner* v. *Macomber,* 252 U.S. 189 and *Merchants Loan and Trust Co.* v. *Smietanka,* 255 U.S. 509 as to the definition of "income" and the doctrine of estoppel also is a valid doctrine of law.

Fully accredited agents of the Commissioner, acting within the apparent and actual scope of their authority, were familiar with the methods of accounting employed by petitioners, had accepted the method and had approved its results.

Nevertheless, it should not be necessary to enter into a discussion of estoppel for there is a plain duty of consistency which has been accepted without regard to whether there is a technical estoppel. See *Continental Oil Co.* v. *Jones,* 10 Cir., 177 F 2d 508, cert. den. 339 U.S. 931; *Interlocken Company Inc. v. Comm.* 232 F 2d 873, 877; *Wichita Coca Cola Bottling Co.,* v. *U. S.,* 5 Cir. 152 F 2d 6.

> *The court below has decided federal questions of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual*

course of judicial proceedings as to call for an exercise of this Court's power of supervision. (emphasis by petitioners)

CONCLUSION

It is thus evident that the decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals, also with the First Circuit Court of Appeals and the Fifth Circuit Court of Appeals. It is also contrary to previous decisions of this Court.

A question of taxation being left in such a situation should be resolved by this Court. In the cases here presented the amounts assessed against petitioners by the Commissioner were phenomenal and entirely unobtainable. The amounts as reduced by the Tax Court and affirmed by the Court of Appeals are just as wrong in that it will still take away every penny that the petitioners have saved during their entire lifetime and still leave the major portion of the assessment unsatisfied.

Petitioners pray the Court that this petition for a writ of certiorari be granted and that upon a hearing that the decision of the Court of Appeals be reversed.

Respectfully submitted,

JOHN W. DRISCOLL
SOL GOODMAN
Attorneys for Petitioners

OF COUNSEL:
STANLEY GOODMAN

Dec., 1956.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 1952 ed., Sec. 54.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.54-1 [As amended by T. D. 5381, 1944 Cum. Bul. 188, 189]. *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Com-

missioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits and other matters required to be shown in any return under chapter 1. Every organization exempt from tax under section 101 but required by section 54 (f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by section 29.101-2. The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

Income-tax forms shall be prescribed by the Commissioner and shall be executed and filed in accordance with these regulations and the instructions on the form or issued therewith.

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PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,755

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by John Driskill for petitioners and by Davis W. Morton, Jr., for respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 26, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 13, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,756

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by John Driskill for petitioners and by S. Dee Hanson for Respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 26, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 13, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 12,764

CAUSE ARGUED AND SUBMITTED

(Oct. 10, 1956—Before: McAllister, Miller and Stewart, JJ.)

This cause is argued by Sol Goodman for petitioners and by S. Dee Hanson for respondent and is submitted to the court.

JUDGMENT

(Filed: Oct. 17, 1956)

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel, and the court being duly advised,

Now, Therefore, It is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed upon the opinion of the Tax Court.

PETITION FOR REHEARING

(Filed Oct. 31, 1956)

ORDER DENYING REHEARING

(Filed: Nov. 21, 1956)

The petition for rehearing is denied.

CERTIFICATE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 687

JOHN FEDERIKA AND CATHERINE FEDERIKA, HIS WIFE, MAX FOGEL AND HELEN FOGEL, HIS WIFE, ROBERT FOGEL AND SYLVIA FOGEL, HIS WIFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 10a–24a)[1] are not officially reported. The Court of Appeals affirmed on the opinion of the Tax Court (Pet. 12).

[1] Unless otherwise noted, record references are made to the Appendix to the taxpayers' brief in the Court of Appeals in the *Federika* case only, since the issues and findings in the *Fogel* cases are substantially the same. And unless otherwise indicated the term "taxpayer" has reference to Mr. Federika, since the wives are parties only because joint returns were filed for some of the taxable years.

JURISDICTION

The judgments of the Court of Appeals were entered on October 17, 1956. (Pet. 12–14.) The taxpayers' petitions for rehearing were denied on November 13 and 21, 1956. (Pet. 12–14.) The petition for a writ of certiorari was filed on January 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Tax Court properly disallowed, for lack of proof, part of the deductions claimed by taxpayers for losses from gambling transactions, where taxpayers had destroyed the original records of their operations and sought to substantiate the deductions by uncorroborated testimony which the Tax Court did not believe.

STATUTES AND REGULATIONS INVOLVED

The following portions of the Internal Revenue Code of 1939 and Treasury Regulations 111 are pertinent:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.
>
> * * * * *
>
> (26 U. S. C. 23.)
>
> SEC. 54. RECORDS AND SPECIAL RETURNS.
>
> (a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records,

render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 54.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.54–1 [as amended by T. C. 5381, 1944 Cum. Bull. 188] *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. * * * The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

STATEMENT

The facts, as found by the Tax Court (R. 10a–21a), and as adopted by the Court of Appeals, may be summarized as follows:

The taxpayer has been a bookmaker since 1933 in Ohio, although the acceptance of bets on horse races through the operation of handbooks is illegal in that state. During the taxable years in question (1947–1950) the taxpayer maintained an office in Norwood, Ohio. On business days several of his representatives at locations in the surrounding area would accept wagers and call them in to his office by telephone. (R. 11a.)

With one exception, the taxpayer's understanding with his agents was that the taxpayer and they were to divide evenly the profit from the wagering, less the cost of newspapers and racing forms, cost of telephone service and rent paid by the taxpayer to the owner of the premises where bets were accepted. (R. 11a.)

The bets called in by the various agents were recorded by clerks in the taxpayer's office. This was done on a 58-line sheet each day for each location from which a clerk was taking phone calls. The following recordings were made on these sheets: name of horse, the amount and nature of the bet, whether it won or lost, and a number or letter identifying the bettor. At the end of the day a clerk would determine the profit or loss from the operation. Thereafter, the sheets were given to the taxpayer who made entries from them into his permanent records. The detailed sheets were destroyed by the taxpayer because he feared that they could be used as evidence in proceedings against him growing out of his bookmaking activities. (R. 12a–14a.)

The taxpayer's permanent records, the only records available, contained only a single net win or loss figure which purportedly represented a summary of the net results of the betting operations, without giving any details, such as horses bet on, amounts wagered, amounts paid out, or names of bettors. A number of days were listed as net loss days as to which no winnings were recorded. (R. 14a–16a.)[2]

During the taxable years, the taxpayer also wagered on horse races on his own account and in each of the years sustained a net loss from these personal wagers. The detailed records on these transactions were not destroyed. (R. 16a.)

During 1949, the taxpayer had an interest in a partnership known as K. F. & P. Enterprise. This partnership was engaged in the business of accepting wagers on horses and was located at the taxpayer's office. There was no evidence indicating the details of the partnership's activities, the profits or losses from its operations during the time the taxpayer was

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[2] In the *Fogel* cases the taxpayers carried on their bookmaking activities through four partnerships, three of which engaged in the making of wagers on horse races, while the fourth accepted bets which it placed with others. The income reported by each partnership was computed by accountants on the basis of certain summary records furnished by the partners, detailed records having been destroyed. The accountants had no personal knowledge of the accuracy or reliability of the figures contained in the records given them. As in the *Federika* case, the detailed betting sheets having been destroyed, the taxpayers relied on oral testimony to establish the reliability of the net loss entries in the retained summary records. (Appendix to the taxpayer's brief in the *Fogel* case in the Court of Appeals, number 12756, pp. 12a–13a, 14a, 19a.)

a partner, or the reasons for certain payments taxpayer claims he made to it. (R. 16a, 18a–19a, 23a.)

The taxpayer prepared his own returns for the taxable years. He listed his occupation as "Sports Commissioner." On each return he reported only one figure for his bookmaking and wagering activities for the year. This figure allegedly was the net profits from his bookmaking activities. In computing the amount reported for 1949, he also included a loss of $1,895.07 from the operations of K. F. & P. Enterprise. (R. 16a.)

The Commissioner of Internal Revenue in his computation disallowed losses from handbook operations on the days listed as net loss days for lack of substantiation and disallowed the loss claimed from the partnership operations for the same reason. The Commissioner allowed as deductions, losses from the personal wagering transactions which were substantiated by the records not destroyed, amounts of business expenses claimed as deductions from "net commissions" or gross receipts, and losses sustained on days when net wins were recorded and on days when losses were equal to winnings. (R. 19a–22a.) [3]

The Tax Court found that the taxpayer had failed to prove that he sustained losses in the amounts claimed. It refused to believe the taxpayer's uncor-

[3] In the *Fogel* cases the Commissioner allowed as deductions expenses and losses on net win days and days when wins equaled losses, but denied losses on net loss days for lack of substantiation. He also limited deductions for payments in the bookmaking operation to 86 percent of the amounts wagered. (See Appendix to the taxpayer's brief in the *Fogel* case in the Court of Appeals, number 12756, p. 30a, 33a.)

roborated testimony that the summary daily net loss figures recorded by him reflected actual amounts of daily net losses sustained in his bookmaking operations. However, it found from the entire record that the taxpayer did experience some days on which losses exceeded winnings, and allowed a reasonable addition to the losses allowed by the Commissioner. (R. 22a.) The Court of Appeals affirmed upon the opinion of the Tax Court. (Pet. 12–14.)

ARGUMENT

1. The Commissioner of Internal Revenue and the courts were here faced with the situation of taxpayers, engaged in gambling enterprises, who, for reasons sufficient to themselves, found it undesirable to retain records itemizing payments claimed to be deductible in the computation of their taxable income. In the place of these records the taxpayers offered oral testimony that they suffered the gambling losses which were reflected in the summary totals which were the only records they did retain. The Commissioner disallowed part of those deductions and the Tax Court, disbelieving the taxpayers' testimony, also reduced the totals of the deductions claimed (R. 22a). Now, the taxpayers complain that the action of accepting the figures on receipts and part of the figures on losses, while rejecting a part of the figures on payments, is arbitrary and unreasonable (Pet. 3–4).

In the first place it is clear that the burden of proof was on the taxpayers to prove the existence of losses if they were to be allowed to take advantage of the privilege of making the deductions. *Boehm* v. *Com-*

missioner of Internal Revenue, 326 U. S. 287, 294; *Interstate Transit Lines* v. *Commissioner of Internal* Revenue, 319 U. S. 590, 593. If, under the circumstances, taxpayers had been unable to provide satisfactory proof of any losses at all, the deductions would have had to be denied entirely. *Burnet* v. *Houston,* 283 U. S. 223. While it may be that the very nature of the taxpayers' enterprises made them reluctant to retain the original detailed records of their operations,[4] that circumstance cannot shift the burden of proof from the taxpayers.

Since it was not in dispute that the taxpayers suffered some losses, it was incumbent on the Commissioner and the Tax Court to reach the best estimate they could as to the extent of the deductible losses on the basis of the facts available. *Cohan* v. *Commissioner of Internal Revenue,* 39 F. 2d 540 (C. A. 2). It does not destroy the validity of that judgment that the figures accepted as a deduction were estimates only and concededly could not be expected to do more than approximate the actual payments. *Helvering* v. *Safe Deposit Co.,* 316 U. S. 56.

[4] Taxpayer was required, under Section 54 (a) of the Internal Revenue Code of 1939, and Section 29.54–1 of Treasury Regulations 111, *supra,* pp. 2–3, to "keep such permanent books of account or records * * * as are sufficient to establish the amount of the gross income and the deductions, credits and other matters required to be shown in any return under chapter 1." He was further required to keep these books and records "at all time available for inspection by internal-revenue officers" and to retain them "so long as the contents thereof may become material in the administration of any internal-revenue law." This the taxpayer failed to do; instead, he destroyed his original, detailed records to avoid prosecution for his illegal gambling activities. (R. 12a–14a.)

In summary, therefore, the Tax Court made its findings as to the total of the deductions for losses which the record before it would sustain and the court below affirmed those findings. Such concurrent findings are not ordinarily reviewed by this Court. *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214.

2. There is no merit in taxpayer's assertion that the decision below is in conflict with other decisions. Whether a taxpayer has sustained the burden of proving the amount of a claimed loss deduction presents a question of fact, and in each case its determination necessarily turns on the sufficiency of the evidence proffered in support of the claimed deduction. In *Showell* v. *Commissioner,* 238 F. 2d 148 (C. A. 9th), upon which taxpayer chiefly relies (Pet. 4–5), the Court of Appeals applied the same basic principles governing the taxpayer's burden of proof and the finality of the Tax Court's factual determinations as were here applied by the court below; it remanded the case for further proceedings only because the Tax Court, in refusing to accept the taxpayer's claimed losses, did not base its action on disbelief in his testimony.[5] In this case the Tax Court explicitly declined to attach credence to taxpayer's testimony.[6]

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[5] Indeed, the court there stated (p. 152) that "If the findings were a little different" it would have affirmed the Tax Court's decision. And in this connection it cited with approval *Nellis* v. *Commissioner,* 232 F. 2d 890, a similar case in which the Tax Court's decision was affirmed by the same court (Sixth Circuit Court of Appeals) which affirmed the Tax Court's decision in this case.

[6] Substantially the same finding was made in the *Fogel* cases. See Appendix to taxpayers' brief in the Court of Appeals, number 12,756, p. 30a.

Equally misplaced is taxpayer's reliance (Pet. 5–7) upon *Winkleer* v. *United States,* 230 F. 2d 766 (C. A. 1) and *Humphrey* v. *Commissioner,* 162 F. 2d 853 (C. A. 5), certiorari denied, 332 U. S. 817. Those cases stand for the proposition that the tax on income derived from wagering transactions is based not on the gross income, but on the net income after offsetting losses. Neither the Commissioner nor the court below here attempted to impose a tax on taxpayer's gross income. On the contrary, the Commissioner allowed a portion of taxpayer's claimed losses, and the Tax Court allowed an additional portion; the sole issue litigated below was whether the taxpayer met the burden of proving that losses over and above the amounts allowed by the Tax Court were in fact sustained.

Nor is there any conflict with *Helvering* v. *Taylor,* 293 U. S. 507, upon which taxpayer also apparently relies. (Pet. 7.) This Court there (p. 514) reaffirmed the rule that "the burden is upon the taxpayer to establish the amount of a deduction claimed." The issue of whether the findings are arbitrary depends on the facts in each case. There is no conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957